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No. 86-864

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM B. AKERS ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the court of appeals erred in affirming the Tax Court's determination of the fair market value of a scenic easement conveyed by petitioners to a charitable organization.

1. Petitioners were the owners of a large tract of land in Cheatham County, Tennessee, known as the Treanor Tract. This 1261-acre tract was improved by two vacation homes, one of which was occupied by petitioners and the other by their relatives. Pet. App. 23a-24a. In 1977, petitioners granted a 30-year scenic easement covering this property to the Tennessee Conservation League, a qualified charitable organization under Section 170(c) of the Internal Revenue Code.[1] Under the provisions of the scenic easement, petitioners pledged not to construct any more than six single-family residences on the property. All new structures, as

[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

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well as alterations to existing structures, changes to access roads, excavations, plantings, removal of trees, and changes in the use of the property, were subject to review by the Tennessee Conservation League. The League could disapprove such changes if they threatened to interfere with the preservation of the natural environment as it existed when the easement was granted. At the end of the 30-year term, petitioners' interest in the property would return to being unencumbered by the easement. Pet. App. 2a-4a.

On their joint federal income tax returns for 1977, 1978 and 1979, petitioners claimed charitable deductions for the gift of this easement in the amounts of $110,648, $103,240, and $68,536 respectively.[2] The Commissioner disallowed these deductions on the ground that petitioners had failed to establish the fair market value of the easement at the time it was granted. Pet. App. 11a.

Petitioners sought redetermination of the resulting deficiencies in the Tax Court. Both sides offered expert testimony from knowledgeable real estate appraisers concerning the value of the easement on the Treanor Tract. Petitioners' expert, Benjamin B. Doubleday, valued the easement at $772,000. He reached this value by deducting his estimate of the post-easement fair market value of the property from his estimate of the property's value unencumbered by the easement. In determining the unencumbered value of the 1261-acre Treanor Tract, Doubleday used the "market data" approach to valuation and selected as comparable sales 13 sales of property consisting of smaller tracts ranging from five acres to 132 acres in size. In

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[2]Petitioners were precluded by the percentage limitations of Section 170(b)(1) from claiming a charitable deduction in excess of $110,648 on their 1977 return. The amounts claimed on their returns for 1978 and 1979 were carryovers of the excess amount from 1977. See I.R.C. § 170(d)(1); Pet. App. 11a.

determining the post-easement value of the Treanor Tract, Doubleday relied primarily on sales of isolated tracts with little subdivision potential, which were marketable primarily as timberland. Pet. App. 14a-17a.

The Commissioner offered the expert testimony of two appraisers. Paul Johnson, one of the Commissioner's expert witnesses, was a real estate appraiser employed by the Internal Revenue Service. He testified that the pre-easement value of the property, which he found to be $668,500, was undiminished by the grant of the easement because the highest and best use of the property, both before and after the grant of the easement, was for secluded vacation retreats. In his opinion, the easement did not impair this use and actually enhanced it by assuring privacy to the owners of such retreats. Accordingly, Johnson concluded that the value of the easement was zero. Pet. App. 13a-15a.

Dennis H. Donovan, the Commissioner's second expert witness, concluded that the grant of the easement caused a slight reduction in the fair market value of the Treanor Tract because it restricted the subdivision potential of the land during the easement's 30-year term. In determining the pre-easement value of the property, Donovan gave primary weight to two sales of large tracts of land in the general vicinity of the Treanor Tract that he found to have been comparable to the subject property in terrain, road access, and subdivision potential. For the post-easement value of the Treanor Tract, Donovan relied primarily on one sale of a 2,200-acre tract with limited subdivision potential. By comparing these sales and adjusting for the value of the reversion of the Treanor Tract at the end of the 30-year easement, Donovan concluded that the easement had a value of $114,000. Pet. App. 15a, 19a-20a.

The Tax Court found that the easement had a value of $114,000. The court found that Donovan's analysis of the comparable sales was the most reasonable of the three presentations by the expert witnesses, and it accepted his conclusion as to the value of the easement. Pet. App. 19a-21a. In rejecting Doubleday's estimate of $772,000 for the value of the easement, the court pointed out that Doubleday had treated sales of tracts as small as five acres as comparable to the 1261-acre Treanor Tract without adjusting for the large expenditures required to subdivide it, to build roads and improvements, and to market a large number of small parcels (*id.* at 15a-17a). Conversely, the court rejected Johnson's conclusion that the value of the tract was unaffected by petitioners' granting of the easement, pointing out that the easement had an adverse effect on the potential of the land for subdivision at any time during the 30-year life of the easement (*id.* at 18a-19a).

The court of appeals unanimously affirmed in a per curiam decision (Pet. App. 23a-30a). The court noted that both Donovan and Doubleday had relied on "comparable sales" in valuing the Treanor Tract, but that they had disagreed on what sales were truly comparable (*id.* at 25a). The court accepted as "clearly correct" the Tax Court's finding that Donovan had selected the appropriate "comparable sales" by analyzing sales of other tracts containing 1,000 or more acres each, rather than sales of tracts "averaging less than a tenth that size" (*id.* at 27a).

3. The court of appeals' decision turned on whether the Tax Court's factual finding as to the value of the donated easement was erroneous. That finding depended upon which expert witness's testimony was found to be most convincing—a matter peculiarly within the province of the trier of fact, whose decision should not be disturbed except for an abuse of discretion. See, *e.g.*, *Palmer* v. *Commissioner*, 523 F.2d 1308, 1310 (8th Cir. 1975). For the reasons

well stated by the court of appeals (see Pet. App. 25a-30a), the Tax Court's judgment that Donovan's expert testimony was the most credible was a sound one. In any event, the court of appeals' decision presents no issue warranting the attention of this Court.

Petitioners struggle in vain to paint the decision below as one based on legal rather than factual grounds. They assert (Pet. 13-17, 21-23) that the decision conflicts with several Tax Court decisions, most of which petitioners did not even cite to the court of appeals. Even if there were such a "conflict," a conflict between the Tax Court and a court of appeals would not necessitate this Court's intervention. See Sup. Ct. R. 17. In any event, the premise of petitioners' assertion is mistaken because the decision below is fully consistent with the state of the law in the Tax Court. Indeed, the decision below *affirmed* a decision of the Tax Court.

Petitioners' contention (Pet. 10-11, 18-24) that the court of appeals committed legal error by assertedly failing to follow the applicable Treasury Regulation, 26 C.F.R. 1.170A-1(c)(2), is wholly without merit. Both courts below applied the test of that regulation for determining "fair market value," since each court undertook to ascertain "the price at which the property would change hands between a willing buyer and a willing seller" (*ibid.*). That inquiry was the subject of the expert testimony that formed the basis for the Tax Court's finding as to the easement's fair market value, a finding that was affirmed by the court of appeals. The regulation plainly does not establish a general rule that the market value of a large parcel of land is to be determined by comparing it to the values received upon the sale of small, subdivided parcels used for residences. Indeed, as the court of appeals noted (Pet. App. 26a), the text of the regulation indicates precisely the contrary.

As the court of appeals also explained (Pet. App. 26a-27a), the decision on which petitioners place primary reliance, *Anselmo* v. *Commissioner*, 757 F.2d 1208 (11th Cir. 1985) (see Pet. 21-23), in fact strongly supports the valuation approved by the courts below. In that case, the Tax Court and the court of appeals held that a donation of a large quantity of unfinished gems should be valued by reference to the wholesale market—*i.e.*, by reference to the price that a jeweler would pay for the uncut stones, not to the price that the ultimate consumer would pay for them once they had been finished and mounted. Similarly here, the relevant market for petitioners' large tract of land was the wholesale market of developers or other purchasers of large parcels, not homeowners who purchase small, subdivided lots.

This conclusion obviously accords with common sense. When a large parcel of land is put up for sale, it is most likely that it will be purchased as a unit. It would be quite unrealistic for someone who places a 1261-acre parcel on the market to expect hundreds of potential homeowners to approach him and purchase small bits of the tract. Rather, the market he could expect to respond to the sale offer would consist of persons who would purchase the whole tract (perhaps with a view to subdividing it eventually and offering smaller parcels for sale). Finally, the *Anselmo* case confirms that the valuation issue presented here is "a question of fact," not a question of law (757 F.2d at 1213).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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